No. 10148

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. G. BOSWELL COMPANY AND CORCORAN TELEPHONE EXCHANGE, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for the enforcement of an order issued by it against respondents pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. V, Title 29, Sec. 151, *et seq.*). Respondents are California corporations engaged in business at Corcoran, California, within this judicial circuit, where the unfair labor practices occurred. The jurisdiction of this Court is based upon Section 10 (e) of the Act.

The pertinent provisions of the Act are set out in the Appendix to this brief, *infra,* pp. 48–49.

STATEMENT OF THE CASE

Upon the usual proceedings had pursuant to Section 10 of the Act, fully set forth in the Board's decision (R. 500–508), the Board, on September 29, 1941, issued its findings of fact, conclusions of law, and order (R. 500–626; 35 N. L. R. B. 968), which may be briefly summarized as follows:

Omitting jurisdictional facts, which are fully detailed *infra,* pp. 4–9, the Board found that respondent J. G. Boswell Company, herein called Boswell Company, in violation of Section 8 (3) of the Act, evicted seven employees from its plant and thereafter refused to reinstate them because of their membership and activities in the Cotton Products and Grain Mill Workers Union, Local 21798, herein called the Federal; that it dominated, interfered with, and assisted the formation and administration of J. G. Boswell Company Employees' Association of Corcoran and Tipton, California, herein called the Association,[1] in violation of Section 8 (2); and that by the foregoing action and various anti-union conduct of its supervisory employees, the Boswell Company interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8 (1) (R. 527, 537–538, 551–553, 556–557, 575–580, 615–616). The Board further found

[1] The Association was duly served with a copy of the Board's amended complaint and notice of hearing, but did not desire to intervene in the proceedings (R. 504; 2401).

that respondent Corcoran Telephone Exchange, herein called the Exchange, violated Section 8 (3) and (1) of the Act by discriminating in the hire and tenure of employment of Margaret A. Dunn (R. 599, 615–616). In addition to the usual cease and desist and posting provisions, the Board's order directs Boswell Company to offer reinstatement with back pay to the employees discriminated against, to place certain other employees upon a preferenial hiring list, to afford all employees reasonable protection in the plant, and to refuse to recognize the Association as the collective bargaining representative of any of its employees; the order also directs the Exchange to reinstate with back pay Margaret A. Dunn (R. 617–621).

SUMMARY OF ARGUMENT

I

Upon the undisputed facts, the National Labor Relations Act is applicable to respondents.

II

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, Boswell Company and the Exchange have engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3), and Section 8 (1) and (3) of the Act, respectively.

III

The Board's order is valid and proper under the Act.

ARGUMENT

Point I

Upon the undisputed facts, the National Labor Relations Act is applicable to respondents

1. Boswell Company

Boswell Company, a California corporation, is engaged in California and Arizona in the business of growing and processing cotton and of manufacturing cotton seed products (R. 508–509; 715–718).[2] Of the products manufactured and processed during the period from July 1, 1937 to June 30, 1938, at its Corcoran, California, plant, where the unfair labor practices occurred, respondent shipped to points outside California all the bales of cotton owned by it, numbering over 40,000, approximately 860 bales of linters, and 60 tons of cottonseed cake; during the same period, it used at its Corcoran plant approximately 52,000 jute "patterns" imported from India and steel bands received from Alabama (R. 509–510; 715–718).

Upon the foregoing facts stipulated by counsel, the applicability of the Act to Boswell Company is not open to question. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453; *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601; *N. L. R. B.* v. *Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368, 371 (C. C. A. 9).

[2] The references preceding the semicolons are to the Board's findings; the succeeding references are to the supporting evidence.

2. The Exchange

The Exchange, a California corporation, is engaged in the telephonic communications business in Corcoran, California, where it provides to residents and business establishments the only available telephone service (R. 515; 2459–2464, 2489, 3222–3224). Long distance calls to or from points outside the city of Corcoran or the State of California are effectuated through the joint facilities of the Exchange and the Pacific Telephone and Telegraph Company, a directly controlled subsidiary of American Telephone and Telegraph Company, which, pursuant to an agreement with the Exchange, maintains a cable of telephone wires connected to the Exchange's switchboard in Corcoran (R. 515–516; 2462–2464, 2470, 2475–2476, 2494–2496, 3220–3222). At least three of the Exchange's subscribers—Boswell Company, Western Union Telegraph Company, and the Atchison, Topeka and Santa Fe Railroad—are engaged in interstate commerce (R. 515, 517; 2478–2479, 2491–2492). During 1938 the Exchange handled over 35,000 toll calls through the facilities of the Pacific Telephone and Telegraph Company; of this number there were 77 outgoing calls to points outside California and an undisclosed number of incoming calls from points outside the State (R. 516; 2471–2475, 2490–2492).

The Exchange has contended before the Board (R. 516) that its interstate communications are too small to confer jurisdiction upon the Board. Its position is without merit. The facilities of the Exchange are

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an integral part of the vast network of telephone lines which cover the entire nation. While these lines are owned by a large number of small telephone companies, such as the Exchange, they are operated as a unified system by virtue of physical connection of the lines and such operating agreements as are here involved.[3] The Exchange's facilities and lines are admittedly available and used for the transmission of interstate messages, both those originating and terminating within

[3] The annual report of the Pacific Telephone and Telegraph Company for 1938 states that:

"Throughout the Pacific Coast, in addition to the number of telephones we own and operate—1,853,229 as of December 31, 1938—there were also 283,922 telephones served by 309 other companies with which our toll and long distance lines connect. At the end of the year, inclusive of 56,899 rural and private-line telephones, there was a total of 2,194,050 telephones in the Pacific Coast territory in which we operate. All of the telephones which we operate on the Pacific Coast and those independently owned and operated by connecting companies have complete connection with the Bell System, of which our company is a constituent part. At the end of the year the Bell System telephones totaled, in round figures, 15,761,000, and they interconnected with about 4,124,000 served by connecting companies, all connected by wire or radio telephony with 17,915,000 telephones in other countries and continents. About 93 percent of the world's 40,600,000 telephones are now interconnectible, and the Pacific Coast has promptly available this world-wide service" (R. 2466–2467).

According to the Report of the Federal Communications Commission on the Investigation of the Telephone Industry, 76th Congress, 1st Session, House Document No. 340, p. 141:

"By the end of 1936 the Bell System's control of the desirable telephone-exchange territory in the United States was substantially complete. The integrated system of the long-lines department, the Bell System operating companies, and the connecting independent operating companies [such as the Exchange] furnished an efficient and uniform interconnected Nation-wide telephone service."

See also F. C. C. Report, *supra*, p. 147.

the Exchange's system. The Exchange is thus an *instrumentality* of interstate commerce, and as such is clearly subject to Federal regulation, irrespective of any showing as to the amount of interstate traffic actually using its facilities. *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, 128; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1, 9; *N. L. R. B.* v. *Central Missouri Telephone Co.,* 115 F. (2d) 563 (C. C. A. 8); *The Minnesota Rate Cases,* 230 U. S. 352, 390. Moreover, respondent's interstate aspects assume greater importance by virtue of the fact that the Exchange furnishes the only medium of telephonic communication available to the business establishments of Corcoran, California. The Act "cannot be applied by a mere reference to percentages" (*Santa Cruz Fruit Packing Co.* v. *N. L. R. B.,* 303 U. S. 453, 467); it is applicable even though the interstate business "involve[s] but a small part of the entire service rendered by the" Exchange. (*Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, 221; *N. L. R. B.* v. *Fainblatt,* 306 U. S. 601.) [4]

Precisely in point is the holding of the Eighth Circuit Court of Appeals in the *Central Missouri Telephone Co.* case, *supra,* where the company contended

[4] Comparatively small, independent companies, such as respondent, comprise an important part of the total continental telephone network. "Although the Bell System controls approximately 82 percent of the telephones in the United States, as well as 98 percent of the toll wire mileage, it operates only some 6,700 of the approximately 20,000 exchanges in the country. Toll messages originated by or destined for subscribers at approximately 13,300 exchanges may, and generally do, make use of the services and facilities of both Bell and independent companies." Report of the F. C. C., *supra,* at p. 143.

(115 F. (2d) at 565–566) (1) that since it was a "local telephone company, engaged mainly in the transmission of intrastate communication over lines lying wholly within the limits of one state, [it] cannot be held an instrument of interstate commerce by the mere fact that it effects the transmission of interstate messages to and from points served by it by connecting its lines to those of an interstate carrier"; and (2) that the "interstate messages originating or received over respondent's lines amount to a relatively small percent of the total messages transmitted by respondent in any one year." The Court stated:

> These contentions clearly have been foreclosed to respondent by the decisions of the Supreme Court and by at least one decision of this circuit. *The Daniel Ball,* 77 U. S. (10 Wall.) 557; *Ci., N. O. & Tex. Pac. Ry.* v. *Int. Com. Com.,* 162 U. S. 184; *United States* v. *Colorado & N. W. R. Co.,* 8 Cir., 157 F. 321; and see *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1, 37; *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 128; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 606. "Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution." *Associated Press* v. *National Labor Relations Board, supra.* The respondent, in so far as it uses its lines to effect the transmission of interstate communication, thereby becomes an instrument of such commerce.
>
> * * * The fact that only a small part of its activities are connected with interstate com-

merce is not material. "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 606.

See also *N. L. R. B.* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 326; *N. L. R. B.* v. *Crowe Coal Co.,* 104 F. (2d) 633, 636 (C. C. A. 8), cert. denied 308 U. S. 584; *N. L. R. B.* v. *Cowell Portland Cement Co.,* 108 F. (2d) 198, 201–202 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. (2d) 780 (C. C. A. 9); *Consumers Power Co.* v. *N. L. R. B.,* 113 F. (2d) 38 (C. C. A. 6); *Southern Colorado Power Co.* v. *N. L. R. B.,* 111 F. (2d) 539, 542–543 (C. C. A. 10); *N. L. R. B.* v. *Suburban Lumber Co.,* 121 F. (2d) 829 (C. C. A. 3); cert. denied, 314 U. S. 693.

Point II

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, Boswell Company and the Exchange have engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3), and Section 8 (1) and (3) of the Act, respectively

A. The Boswell Company

1. Interference, restraint, and coercion in violation of Section 8 (1) of the Act

Intermittent attempts to organize Boswell Company's employees, begun in January or February 1938, resulted in the calling, on July 13, 1938, by Organizer Prior of the first formal organizational meeting of the Federal (R. 518–519; 816–824, 1014–1016, 1045–1049, 1100–1102, 1105–1107, 1834–1837). Among those who attended were Supervisor Bill Robinson and Clyde Sitton, nephew of Superintendent Gordon Hammond

(R. 519; 820–822, 1106–1107, 3147). Immediately following this meeting, Boswell Company's supervisors,[5] as the Board found (R. 520–521), "inaugurated a course of conduct tending to obstruct the formation and growth of the Federal." Supervisors Tom and Joe Hammond made it clear to the employees where respondent stood with respect to the Federal: Thus within the next 2 days, Tom Hammond interrogated an employee about his Federal affiliation, advising that the Federal was "a no-good bunch trying to run somebody else's business" (R. 521; 1748–1750); while Joe Hammond bluntly informed Employee Andrade that Boswell Company would never tolerate or recognize a union, warned that respondent would shut the mill in the event that a union gained a foothold, and pointedly inquired whether the Federal would feed Andrade if the mill closed (R. 521–522; 1702–1703). This anti-union conduct was intensified during the months of August and September. Supervisors Joe and Tom Hammond, in wholesale fashion, questioned employees about their union affiliations, the Federal, and its membership (R. 522; 985–986, 992, 994–995, 1035–1037, 1576, 1617–1619, 1684–1685); advised them to seek employment elsewhere if they wanted to join a union (R. 522; 994–995, 1618–1619); warned that union members would not be reemployed at the termination of the approaching seasonal lay-offs (R. 522; 987–989); and threatened to "lock up and shut the door" if the Federal succeeded in organizing the plant (R. 522; 1207–1209. See also 1740–1743).

[5] The supervisory status of these employees and respondent's responsibility for their activities are discussed *infra*, pp. 12–13.

When in October 1938 the Federal protested this conduct to Superintendent Hammond, the latter informed the union committee, composed of Spear, Farr, and Martin, that he had not "authorized" such conduct, but refused to permit the posting of a notice in the plant to the effect that respondent would not discriminate against employees who wished to join the Federal (R. 523; 1519–1528, 1571–1573). Thereafter the anti-union conduct of respondent's supervisory employees continued as before; employees were warned that a union "wouldn't help the plant any" (R. 523; 1704. See also 1780), that certain union members were "just working on borrowed time" (R. 523; 1787), that the Federal was "the worst thing that ever happened here" (R. 523; 1862–1863), and a normal seasonal shut-down was attributed to "the boys joining the union" (R. 523; 1656–1659).

During a conference between Superintendent Hammond and the Federal committee on November 17, Spear called attention to the fact that the supervisors were continuing their coercive conduct, particularly singling out Joe and Tom Hammond (R. 524; 856, 862–864, 1584–1585). However, Hammond merely stated that he had told Joe and Tom not to talk about the Federal and that they had not been authorized to engage in anti-union activities (R. 524; 1159–1164, 3019–3020). That afternoon, Tom Hammond, obviously uninhibited by any restraining orders of his superiors, angrily accused Committeemen Spear and Farr of "trying to get his job" by reporting his anti-union conduct to the Superintendent, ominously adding that "we are going

to straighten this out tomorrow" (R. 527; 990–991, 1533–1537).

The statements and conduct of respondent's supervisory employees hereinabove outlined constitute well recognized forms of interference, restraint, and coercion in violation of Section 8 (1) of the Act, and the Board properly so found (R. 527). See e. g., *International Assn. of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 76–80; *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 600; *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9); *North Whittier Heights Citrus Assn.* v. *N. L. R. B.*, 109 F. (2d) 76, 78 (C. C. A. 9); *N. L. R. B* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780, 788 (C. C. A. 9).

Respondent's contention before the Board (R. 525–526) that it is not responsible for the conduct of Joe Hammond, Tom Hammond, and Bill Robinson is plainly without merit. These men held positions which gave them certain powers of direction and control over other employees which identified them with the management. Tom Hammond and Joe Hammond, salaried employees, supervise the operations of the gins and the mill, respectively; are referred to as "foremen" by the employees whose work they direct; and occasionally laid off and rehired employees (R. 525–526, 624; 864–865, 987–991, 1005–1006, 1077, 1615–1616, 1660–1664, 1689–1690, 1747, 1754–1755, 1788, 2418). Bill Robinson, described by the employees as "foreman" and "subforeman" in the gins, gives orders and instructs the men in the technical performance of their functions;

informs employees when to report for work and when to stop working; and exercises general supervision over them (R. 625; 995, 1016–1018, 1043, 1210, 1223–1224, 1509–1510, 1615, 1785–1786). Since the employees reasonably "could conclude or infer that the acts and deeds of the [men in question] represented the attitude of the employer, then the Board may find that such acts and deeds were the acts and deeds of the employer" even though they were not expressly authorized. *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. (2d) 780, 787 (C. C. A. 9); *Machinists, Link-Belt,* and *Heinz* cases, *supra.* Moreover, as the Board found (R. 526–527), Boswell Company ratified the illegal conduct of its supervisory employees; respondent's failure to take effective means to prevent their recurrence when they were brought to its attention, its refusal to take, or permit to be taken, appropriate steps to eradicate the effects of such conduct or to disabuse the employees generally of their belief that the "acts and deeds" of the supervisors "represented the attitude of" the company (*Pacific Gas & Electric Co.* case *supra*), establishes that Boswell Company "was as responsible for" these activities "as if it had directed them in advance." *Heinz* case, *supra,* p. 521; *Swift & Co.* v. *N. L. R. B.,* 106 F. (2d) 87, 93 (C. C. A. 10); *Consumers Power Co.* v. *N. L. R. B.,* 113 F. (2d) 38, 44 (C. C. A. 6); *F. W. Woolworth Co.* v. *N. L. R. B.,* 121 F. (2d) 658, 661 (C. C. A. 2).

We submit that no issue is raised by respondent's further contention before the Board (R. 525) that even upon the facts as found by the Board the conclusion

that the employees were subjected to illegal compulsions should not be sustained because there was no actual proof of the effect of such conduct upon union membership. Apart from the judicially recognized fact that "the employee is sensitive and responsive to even the most subtle expression on the part of his employer, whose good will is so necessary" [*N. L. R. B.* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 722 (C. C. A. 3); *Link-Belt Co.* case, *supra,* at p. 600], the determination whether given employer conduct has "interfered with, restrained, or coerced" employees in the exercise of their statutory rights is an inference which "must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible." *Link-Belt Co.* case, *supra,* at p. 588; *System Federation No. 40* v. *Virginian Ry. Co.,* 84 F. (2d) 641, 644 (C. C. A. 4), aff'd. 300 U. S. 515. Moreover, "it is not necessary that the interference shall be successful in preventing organization. It is only necessary to show that the employer interfered, intimidated, or coerced. It is the purpose of the statute to see that the employer does not interfere or intrude into the affairs of the employees" *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. (2d) 452 (C. C. A. 7).[6]

[6] See also, e. g., *N. L. R. B.* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, enforcing 1 N. L. R. B. 411, 426, 430; *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270–272; *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 248, 250–251; *N. L. R. B.* v. *A. S. Abell Co.*, 97 F. (2d) 951, 956 (C. C. A. 4); *Fort Wayne Corrugated Paper Co.* v. *N. L. R. B.*, 111 F. (2d) 869, 874 (C. C. A. 7).

For Board orders enforced in the face of proof that the employees, if called, would have testified that they were not actually

2. The eviction of, and the refusal to reinstate, the active Federal members in violation of section 8 (1) and (3)

(a) *The evictions*

As we have already indicated (*supra,* pp. 11–12), on the afternoon of November 17, Supervisor Tom Hammond accused the Federal Committeemen of "trying to get his job" and presciently warned that "We are going to straighten this out tomorrow." On the morning of November 18, Spear, Martin, Farr, Andrade, Wingo, Briley, and Powell, the officers and only active Federal members then employed, appeared for work displaying their union buttons for the first time (R. 528; 1290–1291, 1493–1494, 1618–1620). At 10 a. m. Supervisor Bill Robinson suddenly turned off the power driving the gins, announcing that "We are going to shut the gin down for a little meeting outside" (R. 528; 995). In response to queries from Farr and Martin concerning the nature of the meeting, Robinson explained that "it is about the union * * * we are going * * * to see whether we are going to have this union or not. We want everybody to go out there * * *" (R. 528; 995–996, 1210, 1041–1043. Also see 1496–1497).

In the presence of Supervisors Tom Hammond, Joe Hammond, Bill Robinson, Kelly Hammond, Oscar

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"influenced, restrained, interfered with, coerced, or dominated," see, e. g., *N. L. R. B.* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, reversing 116 F. (2d) 350 (C. C. A. 7); *Bethlehem Steel Co.* v. *N. L. R B.*, 120 F. (2d) 641 (App. D. C.); *American Enka Corp.* v. *N. L. R. B.*, 119 F. (2d) 60, 62–63 (C. C. A. 4); *N. L. R. B.* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 871 (C. C. A. 5), cert. denied, 310 U. S. 651.

Busby, and Rube Lloyd,[7] the assembled employees in the yard staged an anti-union demonstration against the Federal and its members (R. 528–529; 996–1004, 1010–1012, 1210–1220, 1274–1276, 1497–1507, 1622–1625). One employee proclaimed to Farr, "the company doesn't want your union here. I don't see why you fellows should turn agin' the company you are working for" (R. 528; 998). Supervisor Lloyd shouted "throw them [the union men] out" (R. 528; 998–1001, 1044, 1623–1625). With the rallying cry that "the company is behind us," Lloyd's proposal was first echoed by another employee (R. 529; 1000, 1215–1217, 1624–1626, 1707–1708), and then acted upon by three men who seized President Spear while he was explaining the purposes of the Federal, and, accompanied by the remainder of the mob and supervisors, forcibly propelled him across the highway to respondent's offices where they loudly demanded that the Federal men be discharged (R. 528–529; 1001–1003, 1043–1045, 1216–1219, 1500–1504, 1596–1597, 1602–1607, 1706–1710, 2618–2619). General Manager Louis Robinson thereupon appeared and ordered the employees to return to

[7] Kelly Hammond is the supervisor in charge of the night shift in the mill (R. 626; 1754). Oscar Busby, the "foreman" in the machine shop, has from three to five subordinates and is regarded by General Manager Robinson as the top ranking employee in the shop (R. 626; 1011–1014, 2631, 2348). Rube Lloyd, the "building superintendent," supervises the work of the carpenters and construction employees to whom he gives working orders (R. 625–626; 1011–1012, 1622, 1916–1917, 1922, 2630). Both Busby and Lloyd are salaried employees (R. 626; 2410). See pp. 12–13, *supra*, for discussion of Boswell Company's responsibility for the conduct of such supervisors.

work, promising to "straighten the matter out" presently (R. 529; 2619, 2626–2627, 1004–1005, 1219, 1249–1251, 1504–1506).

Upon returning to their posts at the plant the Federal members were prevented from working by the supervisors who shut off the independently controlled motors on their machines and directed them not to start operations (R. 529; 1004–1011, 1220, 1222, 1241–1242, 1506–1509, 1608–1609, 1625–1626, 1709–1711). Farr's appeal for assistance to Tom Hammond, supervisor of the gins, fell on deaf ears (R. 529; 1006). Finally, Supervisor Robinson, remarking that "it seems like either the union men run this or the non-union," advised the Federal members to leave; whereupon the members working in the gins left the plant and went to Farr's home where the latter called General Manager Robinson to inform him of what had transpired (R. 529–530; 1007, 1013–1014, 1222–1224, 1239–1242, 1250–1251, 1513–1515, 1711, 1738). In reply to Farr's inquiry as to whether the men should return to work, Robinson stated that he would think the matter over and let them know (R. 530; 1013–1014, 2620–2621).

Immediately upon their departure, Powell, the only Federal member employed in the yard, was called into the plant and ordered by Supervisors Robinson and Hammond to operate machines left vacant by the other Federal members, an assignment which he declined on the ground that he would be "scabbing on the Union" (R. 530–531; 1283–1291). Bill Robinson thereupon warned Powell to remove his union button before the other employees noticed it and "scattered up the ground

with him" (R. 530; 1290–1291). Confronted thus with the alternative of renouncing his membership in the Federal and "scabbing" or of being manhandled, Powell left the plant and joined the other members at Farr's home (R. 530; 1291–1292).

Without disputing the foregoing facts, respondent seeks to evade responsibility for the evictions on the inconsistent grounds, asserted before the Board (R. 531; 316) (1) that the Federal members acted unreasonably in voluntarily leaving the plant without consulting General Manager Robinson, and (2) that the men were ousted by the non-union employees, without authority from the company, because of resentment against their union activities. Both contentions are without merit.

After having been confronted with a show of force and prevented from working with the approval and assistance of the supervisors, Bill Robinson's "suggestion" to leave the plant must necessarily have been interpreted, as the Board pointed out (R. 531), "as a threat that further interference with their work, if not actual assaults, would ensue if they failed to comply therewith." Under such circumstances, the men clearly acted reasonably in avoiding further disturbances and possible bodily injuries by leaving the plant and immediately appealing to Manager Robinson. As the latter admitted in his report to respondent's president, the Federal members were "run off the job" (R. 535, 569; 2603).[8]

[8] Powell was similarly justified in departing from the plant under threat of physical harm if he did not disassociate himself

Respondent's second contention finds no support in the record.[9] On the contrary, the undisputed evidence hereinabove outlined amply warrants the Board's findings (R. 533) that "representatives of the company initiated, led, and countenanced the entire anti-union demonstration" and were the "principal molestors of the Federal members." Moreover, even assuming the correctness of respondent's contention, contrary to the facts and the Board's findings, respondent was still responsible for the evictions (pp. 23–27, *infra*).

(b) *The refusal to reinstate the ousted employees*

Although General Manager Robinson had informed Farr in their telephone conversation on the morning of November 18 that he would notify the evicted employees whether they should return to work (*supra,* p. 17), no such notification was ever given. Instead, Robinson sought to delegate to the evictors full authority to determine the question of reinstatement. Thus, during the same day, November 18, Robinson suggested

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from the Federal, a plainly illegal condition. Compare *N. L. R. B.* v. *National Motor Bearing*, 105 F. (2d) 652, 658–659 (C. C. A. 9); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 792 (C. C. A. 9), cert. denied 312 U. S. 678; *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. (2d) 452, 460–461 (C. C. A. 7). Thereafter, both respondent and the Federal regarded Powell as being in the same category as the other evictees (R. 537).

[9] While it is true that the Federal had requested Boswell Company to shorten the hours from 12 to 8 per day so as to spread the available work and thereby forestall further lay-offs, and that Boswell Company had apparently acceded to this request "to provide employment as long as possible," there is no evidence that non-union employees resented this fact (R. 531–532).

to Supervisors Busby and Lloyd that a committee be appointed to "talk to the union men that were run off the job this morning and offer to allow them to come back to work on some basis as might be agreed on" at a meeting to be held at the plant that night for the organization of the illegal Association (R. 568–570; 2603, 2617–2618, 2620–2624, 2630–2632, *infra,* p. 30). Again, when Organizer Prior called Robinson that evening for a conference "to straighten [the matter] out," Robinson replied that he could do nothing until he received a report from the employees, adding that he "felt we were fully capable of straightening it out ourselves" (R. 541; 2849, 868–870). The following morning Prior, Spear, and Martin called in person on Robinson and Superintendent Gordon Hammond (R. 541; 1112–1113). Although at that time and for about a week thereafter work was available for all the ousted employees, Robinson merely offered to "feel out the sentiment" among the employees and "see how they felt about these men returning to work," explaining that the situation was "tense" and that he would have to proceed with care to avoid another "flare up" (R. 541; 869–870, 1112–1114, 1135–1140, 1242, 2858, 2862–2872). Robinson then rejected the Federal's eminently proper request for special protection for its members against further molestation while at work, and refused to expedite a final determination of the matter because it allegedly necessitated a decision on the part of respondent's higher officials at Los Angeles, a purely fictitious ground as respondent's president subsequently indicated in informing Prior that the

situation was in the "hands" of "the local management" at Corcoran, i. e., Superintendent Hammond and General Manager Robinson (R. 541, 543; 871–872, 1557–1558, 2608, 2850–2851).

Respondent never offered to reinstate the ousted employees but continued its evasive and dilatory tactics. While indicating on November 26 and 28, in response to further requests for reinstatement, that there was insufficient work for all the ousted employees, respondent refused to give any information as to which jobs were still open or to recognize the right of all evictees to be assured of future reinstatement (R. 543–546; 874–875, 1179–1185, 1188–1191, 2855–2856, 3024–3026, 3172–3173).

On the afternoon of November 28, following the interview with Prior, Robinson sent registered letters to Evictees Martin, Powell, and Andrade, informing them that the operations on which they had been engaged were closed and "your employment by this Company terminated" (R. 544; 2858–2872). Although the jobs of Evictees Spear, Farr, and Wingo were available until December 6, when they received similar registered letters, respondent made no offer of reinstatement in the interim (R. 545, 549; 2868–2872, 3002–3004).[10] Since this was apparently the first time that respondent had employed the medium of registered mail to inform an employee that he was discharged or temporarily laid off, the employees reasonably concluded that the letters

[10] Evictee Briley was reemployed upon personal consultation with Superintendent Hammond and by November 28 had joined the company-dominated Association (R. 538; 800, 2397, 3073).

constituted notice of final discharge (R. 549–551, 555; 1546, 1645, 2933).[11]

While General Manager Robinson was thus ostensibly "considering" and rejecting the Federal's repeated requests for reinstatement, Superintendent Gordon Hammond gave further confirmation of Boswell Company's determination to exclude from its employ adherents of the Federal. Thus, on November 19, after the meeting between the Federal and General Manager Robinson (*supra,* p. 20), Hammond summoned Spear and pleaded, "Now, Lonnie, you see what this union business has led to. You can't hope to put it over * * * if you will drop this union business you can come back to work" (R. 546; 1540–1541). Hammond then indicated that some of the evictees would never be permitted to return to work in the plant (*ibid.*). Spear rejected this offer and a similar one made December 6 (R. 546; 1546–1547). Again, on November 26, Evictee Farr spoke to Hammond about reinstatement after the latter had conferred with the Federal representatives (R. 547; 1088–1090). Although Farr's job was then vacant and remained vacant for a week thereafter (R. 547; 2872), Hammond rebuffed him with the statement, "We can't use you at this time" (R. 544–545, 547; 1090–1091, 2872,

[11] Respondent contends that the purpose of the letters was merely to explain to the employees in question that they would no longer receive the wages which respondent had continued to pay them (R. 549, 555; 2934). This explanation, however, fails to account for the dispatch of a similar letter to Elgin Ely, another Federal member, who was ill and not receiving any pay (R. 554–556; 802, 1781–1782, 1792–1796, 2934). Moreover, the ousted employees had been receiving their checks at respondent's office and could readily have been notified in person of any change (R. 1638, 1085–1086).

3003). Shortly after November 28 Hammond sent for Evictee Powell, assured him that the men would "lay off" him,[12] and offered to reinstate Powell as soon as he discovered that the Federal was "all hooey" and "a bunch of fellows claiming something they couldn't back up" (R. 546–547; 1295–1296, 1452–1453).

In view of their eviction, Boswell Company's refusal to reinstate them unless they surrendered their Federal membership, and the contents of the registered letters, the employees concluded upon receipt of these letters, as the Board found it was reasonable for them to do, that further application for reinstatement would be futile (R. 550; 1546, 1795–1796). Nevertheless, the Federal made one more attempt on January 18, 1939, when Prior inquired whether Robinson had changed his attitude with respect to reinstatement of the Federal members; Robinson's reply was that his position was unaltered (R. 580; 878). With the exception of Briley (*supra,* p. 21), none of the ousted employees had been reinstated at the time of the Board hearing (R. 538).

(*c*) *Conclusion as to discrimination*

The Board found (R. 537–538, 551–553, 616) that Boswell Company was responsible for the ouster from its plant of the Federal members on November 18 and thereafter refused to reinstate them because of their membership and activities in the Federal, thereby dis-

[12] Compare this avowed ability to persuade the evictors to "lay off" Powell with Robinson's rejection of the Federal's requests for reinstatement on the alleged ground that Boswell Company was unable to cope with the situation (*supra*, p. 20).

criminating in their hire and tenure of employment in violation of Section 8 (1) and (3) of the Act. This finding is clearly proper.

That the employees were evicted from the plant because of their membership and activities in the Federal is not disputed. Through the acts of its supervisory employees (*supra*, pp. 15–18), respondent's role in these evictions was direct and unequivocal; hence its responsibility for them is based on the clearest possible grounds. Compare *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 792, (C. C. A. 9), cert. denied 312 U. S. 678; *N. L. R. B.* v. *Ford Motor Co.*, 114 F. (2d) 905, 911 (C. C. A. 6), cert. denied 312 U. S. 689; *N. L. R. B.* v. *Ford Motor Co.*, 119 F. (2d) 326 (C. C. A. 5), enforcing 26 N. L. R. B. 322; *N. L. R. B.* v. *Goodyear Tire & Rubber Company*, 129 F. (2d) 661 (C. C. A. 5); *N. L. R. B.* v. *General Motors Corp.*, 116 F. (2d) 306, 310 (C. C. A. 7). Indeed, even if its supervisory employees had been mere passive onlookers, which we have shown they were not, their failure to take reasonable steps to stop and prevent the molestation of the Federal members, even when called upon for assistance, is in itself sufficient to fasten responsibility on respondent. See, e. g., *N. L. R. B.* v. *Hudson Motor Co.*, 128 F. (2d) 518, 532–533 (C. C. A. 6); *N. L. R. B.* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 986–987 (C. C. A. 7), cert. denied 311 U. S. 662; *General Motors Corp.*, *Ford Motor Co.*, and *Goodyear Tire & Rubber Co.* cases, *supra*.

Nor is respondent's position aided by its assertion that the men were ousted by the non-union employees because of resentment against their union activities, a

fact which we have shown is not borne out by the record (*supra,* pp. 15–19). For sometime prior to the evictions, respondent's supervisors had deliberately disparaged the Federal, impugned its purposes, and created in the minds of the employees a fear for their livelihood by threatening that respondent would close the plant if the Federal gained a foothold (*supra,* pp. 10–12). The anti-Federal demonstration took place in the presence of supervisory employees who made no effort to interfere; on the contrary it was a supervisor who egged them on with the cry of "Throw them out" (*supra,* p. 16). When the matter was brought to the attention of General Manager Robinson, he completely neglected his affirmative duty to take reasonable steps to restore and maintain "order and discipline characteristic of a well-run manufacturing plant" *General Motors Co.* case, *supra,* at p. 311. Under these circumstances, it is manifest, as this Court pointed out in *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 792, cert. denied 312 U. S. 678, that "this attitude of the respondent's non-union employees was encouraged by its agents and supervisory officials, and brought on by them * * * it must be held responsible for what followed * * * the actual effect of respondent's conduct was to discharge those employees." To the same effect are *Clover Fork Coal Co.* v. *N. L. R. B.,* 97 F. (2d) 331, 335 (C. C. A. 6); *N. L. R. B.* v. *Ford Motor Co.,* 114 F. (2d) 905, 911–912 (C. C. A. 6), cert. denied 312 U. S. 689; *N. L. R. B.* v. *Elkland Leather Co.,* 114 F. (2d) 221, 223–224 (C. C. A. 3), cert. denied 311 U. S. 705; *General Motors Corp., J. Greenebaum Tanning,* and *Goodyear Tire & Rubber Co.,* cases, *supra.*

Finally, whether the evictions be regarded as having been perpetrated by the supervisors or the nonunion employees, respondent's subsequent conduct furnishes an independent basis of liability. Under a plain duty to repudiate the unlawful evictions and restore the ousted men to their jobs (see, e. g., *Hudson Motor Co.* case, *supra*), respondent did neither. Without making any investigation of the incident, General Manager Robinson reported that the trouble was caused by the Federal members, thereby indicating his condonation of the action of the evictors and partisanship against the Federal (R. 533–534, 535; 2915).[13] Moreover, instead of reprimanding or discipling the evictors as it should have done, respondent completely surrendered the reins of control to them by delegating full authority to determine the basis upon which the evictees should be permitted to return to work (*supra,* pp. 19–20).[14] At

[13] At the insistence of a Board agent, respondent posted on November 23 a notice to the effect that it would not in the future violate Section 8 (1) and (3) of the Act (R. 535–536). In view of the continued absence of the evicted employees, respondent's leniency toward the leaders of the anti-Federal demonstration, and respondent's subsequent illegal conduct, the Board properly concluded (R. 536–537) that the notice "cannot have impressed the employees as a sincere disavowal or condemnation by the company of the antiunion activities of its plant supervisors."

[14] No amount of pressure upon respondent could have justified such concessions. The statute "leaves no room for the appeasement of hostile interests by conceding [to employees] * * * less than the Act requires." *McQuay-Norris Mfg. Co.* v. *N. L. R. B.*, 116 F. (2d) 748, 752 (C. C. A. 7), cert. denied, 313 U. S. 565. As stated by this Court in *N. L. R. B.* v. *Star Publishing Co.*, 97 F. (2d) 465, 470, "The Act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by the employer."

no time did respondent voluntarily offer to reinstate the ousted employees except on the illegal condition that they abandon the Federal. *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 658 (C. C. A. 9); *Sunshine Mining Co.* case *supra.* And when the Federal representatives made repeated requests for reinstatement, although they were under no duty to do so, respondent refused to reinstate those whose jobs were still open or to give any assurance of future reinstatement to those whose jobs were closed for the season. At the same time respondent made it clear to the evictees individually that surrender of their Federal membership was the price required for reinstatement. Obviously, the mere payment of wages to the men for the brief period which remained until the end of the season's operations did not discharge respondent's duty. Nor was respondent's purported willingness to reinstate the men, without some assurance of protection against future molestation at their work, adequate under the circumstances. In view of the evictions, respondent's failure to repudiate them or discipline those who participated therein, and the admittedly "tense" situation which might cause another "flare-up," the evicted employees were fully justified in insisting on some guarantee of protection. (See, e. g., *Hudson Motor Co.* and *General Motors Corp.* cases, *supra.*) Respondent's conduct plainly demonstrated that it condoned and adopted the evictions as its own. *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 521; *N. L. R. B.* v. *Isthmian Steamship Co.,* 126 F. (2d) 598, 600 (C. C. A. 2); *Hudson Motor Co., Goodyear Tire & Rubber Co.,* and other cases cited, *supra,* p. 24.

Since the evictions and refusal of reinstatement were caused, as the Board found (R. 537–538, 551–553), by the membership and activities of these men in the Federal, the Board properly concluded (R. 615–616) that respondent had discriminated in their hire and tenure of employment in violation of Section 8 (1) and (3) of the Act.

3. The discriminatory discharge of Elgin Ely in violation of section 8 (1) and (3)

Elgin Ely joined the Federal on November 11, 1938 (R. 554; 1784). The next day he discovered that his rate of pay had been reduced (R. 554; 1778). When he asked his superior, Tom Hammond, the reason for the reduction, Hammond replied, "Maybe the union had something to do with it * * *. Maybe you should get your committee together and go up to the office and see if they couldn't find out something about it" (R. 554; 1780). On November 16 Ely was excused from work because of an injured thumb which had become infected (R. 555; 1781–1784, 2977–2979). Thereafter, he received a registered letter from respondent, dated November 28, to the effect that his machine had been shut down on November 26 and that his "employment by this Company terminated at that time" (R. 555; 2862). Because of the contents of this letter, Ely did not apply for reinstatement when he was released for work by his physician on December 2 (R. 555; 1795–1796).

The registered letter was identical with that sent about the same time to the ousted employees (R. 555; 2862, 2866, 2868, 2870, 2872). The medium of regis-

tered mail had never before been used by respondent to notify an employee absent because of illness that he was being laid off or discharged (*supra,* pp. 21–22). Moreover, the primary reason advanced by respondent for sending such registered letters to the evictees, i. e., to notify them that the checks which they had been receiving while not performing any work would be discontinued (*supra,* p. 22), did not exist in the instant case since Ely's last pay check was for the week ending November 17 (R. 55; 802). The foregoing facts plainly indicate that respondent considered Ely to be in the same class with the ousted Federal members and to merit the same discriminatory treatment.

Respondent's contention that no finding of discrimination against Ely may be made because he would in any event have been laid off on November 26 due to seasonal slack, is without merit. The record shows that in previous seasonal lay-offs, the men, including Ely, were reemployed upon application when their operations resumed (R. 556–557, 1204–1205, 1490–1492, 1612–1613, 1655–1656, 1744–1749, 1775–1778, 1805, 1914–1918). The unusual medium employed by respondent to notify Ely of the termination of his job evidences a purpose to deprive him of his normal expectancy of reemployment after a seasonal lay-off. The Board properly concluded (R. 556) that, "in view of the entire background, the Company's acts of discrimination against the ousted employees, and its general antipathy to the Federal," respondent intended by its registered letter to convey to Ely the impression that, as a member of the Federal, the termination of

his employment was *final,* and to "deter him from seeking reinstatement, upon recovering from his injury. The letter had this effect." By such conduct, whether characterized as a discharge or a lay-off, respondent discriminated with respect to the hire and tenure of Ely's employment in violation of Section 8 (3) and (1) of the Act.[15]

4. Domination of, and interference with, the formation and administration of the Association, in violation of section 8 (1) and (2)

Within a few hours after the eviction of the Federal members on November 18, a group of employees, including Supervisors Lloyd and Busby, journeyed on company time to a neighboring city to secure information about the procedure for forming a "company union" as a bulwark against *bona fide* organization (R. 568–570, 571–572; 902–908, 2602–2603, 2614–2618, 2921–2923). That afternoon, the supervisors reported their progress on this project to General Manager Robinson, informing him of their intention to hold a meeting at the plant that evening (R. 569–570; 2602–2603, 2620–2623). Robinson tacitly approved their activities, "suggested" the procedure to be followed at the meeting, and delegated to its organizers full authority to prescribe the conditions for the return of the ousted Federal members (R. 569–570; 2603).

[15] In view of respondent's practice of reemploying its workers after seasonal lay-offs, there is no merit in respondent's further contention before the Board that Ely's employee status had been severed upon the cessation of his work on November 26. *North Whittier Heights Citrus Ass'n* v. *N. L. R. B.*, 109 F. (2d) 76, 82 (C. C. A. 9), cert. denied 310 U. S. 632. The contention is in any event pointless since the Act prohibits discrimination against non-employees as well as those who are employees. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177.

About 50 employees and 6 supervisors attended the meeting held that evening at respondent's office building (R. 569–570; 1542–1544, 2346–2350, 2448–2449, 2923, 3135–3136, 3140–3142). Supervisor Tom Hammond told at least one of his subordinates to be present (R. 570; 2348). Supervisor Busby addressed the employees, proclaiming that there was no reason why a "company union" would not "work" at the plant (R. 571; 2347). After some discussion, blank sheets of paper were circulated and signed by employees and supervisors (R. 571; 2347–2348, 2451–2453).[16]

Formal organization of the Association was perfected at a meeting held on November 28 and attended by the same supervisors, at least four of whom signed the constitution (R. 571; 2352–2355, 2372–2398, 2399, 2407, 2419, 2450–2453). Supervisors Busby and Lloyd were elected vice president and a member of the labor relations committee, respectively (R. 572; 2348–2354, 2406–2411, 2414–2415, 2419–2420, 2450). The remaining offices were filled by employees who, while not strictly speaking supervisors, held positions which, as the Board pointed out (R. 578), "identif[ied] them clearly with the management of the Boswell Company rather than its ordinary plant employees."[17] Notices of Asso-

[16] One employee was accosted outside the meeting room in the presence of Superintendent Hammond with the suggestion that he "go in the office and sign that paper" to "keep this God damned A. F. of L. union out of here" (R. 571; 1790).

[17] *President Hubbard* is respondent's "farm adviser," with an office in the building housing other company officials (R. 578; 2288–2289, 2408–2410). Performing no functions in connection with the operations of the plant, Hubbard's primary duty is to instruct foremen and contractors in farming operations (*ibid.*). *Treasurer Brenes* is the company's cashier and head bookkeeper

ciation meetings were freely circulated in the plant during working hours and at least one employee was warned by Supervisor Tom Hammond to attend the meeting "if you want to keep on working" (R. 512–513; 2350–2352).

The Association presents the anomaly, according to its constitution, of existing for the purpose of collective bargaining with the company in respect to all matters and "to not interfere with the right of any member or members to present grievances individually to the management" (R. 573; 2375–2376). Association membership is limited to employees of 30 days' continuous service; membership on minor committees, to employees of at lease 6 months' service; and eligibility to office or to serve on the labor relations committee, to those of at least one year's continuous service (R. 573; 2376, 2378–2379). Since the rank and file are seasonal employees, control of the Association's affairs, which is vested in a governing board comprised of the officers and members of the labor relations committee, is assured to the supervisors and those closely allied with management (R. 518, 574; 828, 2842, 3000–3001, 3165–3167).

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with supervision over at least one assistant (R. 579; 2411–2416, 2453–2455, 3095–3096). *Secretary Roberson* is a clerical employee (R. 579; 2411). The remaining two members of the important labor relations committee are McKeever and Willoughby; the former is an agronomist engaged in crop raising experiments, the latter is the plant storekeeper (R. 578–579; 2413–2415). Like the supervisors and company officials, all receive a monthly salary and are listed on respondent's Los Angeles pay roll as distinguished from the ordinary employees who receive an hourly wage and are carried on the local pay roll (R. 578–579; 2410–2419).

Although claiming to represent 95 percent of the employees, the Association has never requested exclusive recognition, never sought to bargain with the company, and never attempted to secure a collective agreement (R. 575; 2419–2421, 2435–2436); in fact, it has never even appointed the representatives empowered by the bylaws to discuss such matters with respondent (*ibid.*). The only recorded request ever made by the Association occurred on April 5, 1939, after the bylaws were amended to provide that membership in the Association constitutes a repudiation of membership in any other labor organization (R. 574; 2378). At that time respondent was informed by letter that the Association had a number of unemployed members and was requested to "get in touch" with the Association when laborers were required (R. 574; 2611). The Association was quick to point out, however, that this was "merely a request" and that they were not "agitating for a closed shop" (*ibid.*).[18]

The Board's findings (R. 575–580) concerning the illegality of the Association and respondent's conduct with respect thereto, cannot be seriously challenged. Respondent's open campaign of interference and intimidation against the Federal which culminated in the eviction of its officers and active members, contrasted with respondent's subsequent acquiescence in the activities of the Association promoters on company time and

[18] It is significant, as the Board points out (R. 573), that the only former Federal members who were employed after the evictions of November 18 were persons who joined the Association (R. 2425–2426).

property, reasonably indicated to the employees, as respondent admittedly intended it should (R. 576; 2601–2603), that the company was backing the project as a further counter measure against the Federal. Moreover, the initiation and promotion of the Association by the same supervisors who took an active part in the campaign of intimidation against the Federal, General Manager Robinson's participation in the preliminary plans and decisions, the use of company time and property, the participation as officers and members of supervisors and those reasonably regarded by the employees as representing the management, the presence of restrictive provisions in the constitution and bylaws, and the Association's complete inactivity as a bargaining agency—all these constitute well recognized indicia and forms of domination and support.

In sum, formed under "conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates" (*N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 588), the Association was "not a real bargaining agent or indeed an independent representative of the employees in any respect." *N. L. R. B.* v. *American Mfg. Co.,* 106 F. (2d) 61, 64 (C. C. A. 2), affirmed, 309 U. S. 629. See also *N. L. R. B.* v. *American Potash & Chemical Corp.,* 98 F. (2d) 488, 494–495 (C. C. A. 9) cert. denied, 306 U. S. 643; *N. L. R. B.* v. *Tovrea Packing Co.,* 111 F. (2d) 626 (C. C. A. 9), cert. denied 311 U S. 668; *H. J. Heinz Co., supra,* 311 U. S. at 517–519, 522, *Machinists* case, *supra,* 311 U. S. at 75–78.

B. The Exchange

The discriminatory discharge of Mrs. Margaret A. Dunn in violation of Section 8 (1) and (3)

At the time of her discharge on March 1, 1939, Mrs. Dunn had been employed by respondent for 15 years, the last 13 as head telephone operator (R. 586; 2497, 3298). The Board found (R. 599) that respondent discharged Mrs. Dunn in response to pressure of "a group of local citizens who sought Mrs. Dunn's discharge because of her alleged union sympathies and activity," thereby violating Section 8 (1) and (3) of the Act. The facts found by the Board are as follows:

Early in February 1939 Mrs. Dunn's daughter, Dorothy, was observed speaking to Federal members who were picketing the Boswell Company's plant in protest against its unfair labor practices; on subsequent occasions during the month, Dorothy and her sister, Margaret, were also seen talking to Federal Organizer Prior (R. 587–588, 598; 1673–1680, 2501, 2505). The Dunn family soon began to receive information from local citizens that Dorothy was "in the wrong" with the people of Corcoran, particularly with Boswell Company's president, because she had been seen on the picket line, and that a petition was being circulated in Corcoran to induce the Exchange to discharge Mrs. Dunn because her daughters had been seen on the picket line and because of a belief that Mrs. Dunn was conveying to the pickets, through her daughters, information overheard at the Exchange's office (R. 587; 2571, 2676, 2497–2501). About February 15, Mrs. Dunn, who was not a member of any labor organization and had not transmitted messages to the pickets, questioned the

president of the Exchange, Glenn, about the petition for her discharge (R. 587–588; 2500–2502, 2574, 3252–3256). Glenn thereupon assured Mrs. Dunn that he had no intention of discharging her, that her work had been satisfactory for 15 years, and that he was certain the charges against her were without basis (R. 588; 3256–3257, 2501–2503). Perturbed by additional rumors to the same effect, Mrs. Dunn discussed the matter again with Glenn a few days later (R. 588; 2502–2507). On this occasion Glenn wanted to know whether it was true that her daughters "were going out with any of the men," referring to the Federal members (R. 588; 2505).

On March 1 Glenn suddenly demanded Mrs. Dunn's resignation because "pressure was being brought to bear too heavily on him" and he "just couldn't stand what was being said * * * they were certainly awful" (R. 588–589; 2506–2508). To Mrs. Dunn's anxious inquiries as to whether these "awful" things reflected on her personal character or her work, Glenn replied, "absolutely not," and then asked whether her daughter Margaret was "keeping company" with Organizer Prior (R. 589; 2506–2507). Mrs. Dunn refused to resign (R. 589; 2506).

Late that afternoon Mrs. Dunn's husband called upon Glenn and asked what he had against the Dunn family (R. 590; 2560–2561, 2569–2570). Glenn first told Dunn about the "labor trouble" at the Boswell plant, explaining that this was the first step in an effort to organize all agricultural labor in the vicinity; then pointed out that this "labor trouble" and Mrs. Dunn's discharge "all ties in together," that the Dunn girls had been seen

speaking to the Federal pickets at the Boswell plant, that people were saying the girls were carrying messages from their mother, that "they" were very angry and were threatening to ruin Glenn's business unless he discharged Mrs. Dunn (R. 590; 2561–2565, 3266–3269, 3286–3287). Mr. Dunn thereupon accused Glenn of succumbing to community pressure because of his interests as a farmer (R. 590–591; 2564, 3271–3273).[19]

The next morning, March 2, Glenn discharged Mrs. Dunn, informing her that she was ill, too old for the work, and that "there had been complaints made about the service" (R. 589–590; 2547–2550, 2548). Realizing that he had previously made damaging admissions to Mr. Dunn respecting the true reasons for the discharge, Glenn then sought out Mr. Dunn and attempted to persuade him that his wife was discharged for the reasons assigned to her and not for those advanced the preceding day (R. 591; 2565–2567). During the conversation, however, Glenn admitted that nine men had called upon him and demanded the discharge of Mrs. Dunn (R. 591; 2567–2568, 3287–3289, 3271–3272. See also 2508–2511).

At the hearing the Exchange contended that Mrs. Dunn was discharged because of (1) her physical condition, (2) her alleged habit of drinking wine while at work, (3) her alleged dissension with other employees, and (4) alleged complaints from subscribers about her

[19] Glenn, whose principal occupation is farming, is a member of the Associated Farmers and operates a 5,200-acre grain and cotton farm financed by Boswell Company, to whom he was at that time indebted for crop loans to the extent of approximately $30,000 (R. 586; 2478–2483).

work (R. 592–593). In view of the fact that Glenn had been aware of Mrs. Dunn's physical condition for a long time without commenting thereon (R. 593; 3226–3229, 3238), that Glenn recognized that whatever dissension existed among the operators was probably due to his failure to instruct them clearly as to which one had supervisory authority (R. 594–595; 2567, 3298), that he had received complaints about all the operators and recognized that faulty equipment was a chief cause of unsatisfactory service at that time (R. 595–596; 3290–3295, 3299–3300), that he admitted in February and March 1939 that Mrs. Dunn's work was satisfactory (R. 598, *supra,* pp. 35–36), and that he had first decided upon her discharge after her daughters' visits to the picket line (R. 598–599; 3301. Cf. 2545, 3248, 3250–3251, 3290–3300), the Board properly rejected respondent's defenses as being without merit. Cf. *N. L. R. B.* v. *Bank of America,* 11 L. R. R. 119, 120–121 (C. C. A. 9), decided September 14, 1942.

"The explanation of the discharge offered by respondent did not stand up under scrutiny. This fact in itself strengthens the inference drawn by the Board from the other facts in the case" (*N. L. R. B.* v. *Abbott Worsted Mills,* 127 F. (2d) 438, 440 (C. C. A. 1)) that, in response to "pressure," respondent discharged Mrs. Dunn because of her alleged union sympathies and activities. That a discharge of a non-union employee because of a mistaken belief that he was sympathetic to, or active in, a union violates Section 8 (1) and (3) of the Act has been recognized by the highest authority. *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 589–590; *N. L. R. B.* v. *Remington Rand, Inc.,* 94 F. (2d) 862,

871 (C. C. A. 2), cert. denied 304 U. S. 576. See also *N. L. R. B.* v. *Bank of America,* 11 L. R. R. 119, 121 (C. C. A. 9); *Mooresville Cotton Mills* v. *N. L. R. B.,* 94 F. (2d) 61, 65 (C. C. A. 4); *Mexia Textile Mills* v. *N. L. R. B.,* 110 F. (2d) 565, 566 (C. C. A. 5); *N. L. R. B.* v. *Vincennes Steel Corp.,* 117 F. (2d) 169, 173 (C. C. A. 7); *Rapid Roller Co.* v. *N. L. R. B.,* 126 F. (2d) 452 (C. C. A. 7). The fact that the alleged union activity extends "outside his own employment," is immaterial. *Fort Wayne Corrugated Paper Co.* v. *N. L. R. B.,* 111 F. (2d) 869, 874 (C. C. A. 7), cf. *N. L. R. B.* v. *Peter Caillier Kohler Swiss Chocolates Co.,* 10 L. R. R. 742 (C. C. A. 2), decided July 16, 1942.

Nor is it material, as respondent contended before the Board, that there was no independent evidence to show that Mrs. Dunn was either discouraged (or encouraged) from joining a labor organization. The Board expressly found (R. 599) that Mrs. Dunn's discharge did discourage "membership in the Federal as well as in labor organizations generally." The Board's position that such discrimination necessarily discourages union membership—at the very least that of the discharged employees—and that therefore such discharge is *ipso facto* a violation of Section 8 (3), has been uniformly upheld by the Supreme Court. *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, 129; *N. L. R. B.* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 255; *Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177;[20] *N. L. R. B.* v. *Link-*

[20] In the *Phelps Dodge* case, the court declared that "the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under § 8 (3)" (at p. 187); that "discrimination in hiring [is] an 'unfair labor prac-

Belt Co., 311 U. S. 584, 589, 598, 600, 603.[21] See also S. Rep. No. 573, 74th Cong., 1st Sess., p. 11; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 19. The only circuit court of appeals which ever expressed a contrary view (*Stonewall Cotton Mills, Inc.*, v. *N. L. R. B.*, 129 F. (2d) 629 (C. C. A. 5)), subsequently reversed its position on the Board's petition for rehearing and held that the Board properly inferred that a discriminatory discharge had the effect of discouraging union membership despite the absence of any "positive evidence" that it had such effect (129 F. (2d) at 633).

Point III

The Board's order is valid and proper

The cease and desist provisions of the Board's order are mandatory under the Act as to the unfair labor practices found. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. The provisions

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tice'" (at p. 181); that "it is no longer disputed that workers cannot be dismissed from employment because of their union affiliations" (at p. 183); that "in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act" (at p. 185). The court recognized that antiunion discrimination inevitably discourages union membership, for it stated (at p. 185): "The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization." And further (at p. 186), "We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper."

[21] In the *Link-Belt* case, the court expressly recognized that the discriminatory discharge of a member of the Amalgamated "would tend to have as potent an effect as direct statements to the employees that they could not afford to risk selection of Amalgamated" (at p. 598).

of the order, restraining respondents from "in any other manner" interfering with, restraining, or coercing their employees' exercise of the rights guaranteed in Section 7 of the Act, are proper upon the findings in this case. See, e. g., *N. L. R. B.* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, enforcing 26 N. L. R. B. 1182, 1235; *N. L. R. B.* v. *Electric Vacuum Cleaner Co.,* 315 U. S. 685, enforcing 18 N. L. R. B. 591, 640; *N. L. R. B.* v. *Hollywood-Maxwell Co.,* 126 F. (2d) 815, 819 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. (2d) 780, 789 (C. C. A. 9).

The affirmative provision of the Board's order requiring Boswell Company to afford its employees reasonable protection in its plant from physical interruption of their work and physical assaults or threats thereof directed at discouraging union membership, is "adapted to the situation which calls for redress" (*N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348); it is plainly necessary to expunge the effects of Boswell Company's unfair labor practices and to "assure to [its] employees the rights which the statute undertakes to safeguard" *Republic Steel Corp.* v. *N. L. R. B.,* 311 U. S. 7, 12; *International Ass'n of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 82; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 600; *Phelps Dodge Corp.* v. *N. L. R. B.* 313 U. S. 177, 193–195; *N. L. R. B.* v. *Hudson Motor Co.,* 128 F. (2d) 528, 533 (C. C. A. 6). Similar provisions have been uniformly enforced by the courts. *N. L. R. B.* v. *Ford Motor Co.,* 119 F. (2d) 326 (C. C. A. 5); *N. L. R. B.* v. *Goodyear Tire & Rubber Co.,* 129 F. (2d) 661, 667 (C. C. A. 5), enforcing 21

N. L. R. B. 306, 407; *N. L. R. B.* v. *Riverside Mfg. Co.,* 119 F. (2d) 302 (C. C. A. 5), enforcing 20 N. L. R. B. 394, 422; *N. L. R. B.* v. *General Motors Corp.,* 116 F. (2d) 306, 311 (C. C. A. 7).

The validity of the provisions of the Board's order requiring Boswell Company to refuse to recognize the Association for collective bargaining purposes, and directing both respondents to reinstate with back pay the discriminatorily discharged employees and to post appropriate notices, is well established and requires no citation of authorities.

Although the Board dismissed the allegations in the complaint that Boswell Company had discriminated in the hire and tenure of employment of James Gilmore, Boyd Ely, Walter Winslow, W. R. Johnston, Stephen J. Griffin, and Eugene Clark Ely (R. 622), the Board ordered Boswell Company to place their names upon a preferential list of temporarily laid off employees in accordance with its usual seniority practices and to offer them employment to their former or substantially equivalent positions as such employment becomes available and before hiring other persons for such work (R. 619). In view of Boswell Company's multiple violations of the Act and strenuous hostility toward the Federal and its members, the Board properly concluded (R. 619) that there is grave danger that the employees in question may be refused reemployment so long as they remain members of the Federal even if their former or substantially equivalent positions are available. This requirement is valid as a reasonable exercise of the Board's "informed discretion" as to the appropriate

remedy necessary to expunge the effects of prior unfair labor practices. *Phelps Dodge Corp., Machinists, Pennsylvania Greyhound Lines, Inc.,* cases, *supra.* As the Eighth Circuit Court of Appeals stated in upholding an identical provision in *N. L. R. B.* v. *C. Nelson Mfg. Co.,* 120 F. (2d) 444, 447,

> * * * We think that the Board was justified in holding as it did, that the respondent had engaged in some unfair labor practices. The Board exonerated the respondent from some of the charges but not all of them. Whether the requirement as to continuing the nineteen men [as to whom the Board had dismissed the complaint] on the preferential list would or would not "effectuate the policies of the Act" was a matter peculiarly within the province of the Board to determine.

Boswell Company also contends that some of the employees are not entitled to reinstatement because they obtained substantially equivalent employment. Aside from the fact that the Board found (R. 606, 611–613) upon substantial evidence (R. 982–983, 1016–1019, 1755–1757, 1843–1846, 1867–1869) that the new employment was not substantially equivalent to the old, respondents' contention is foreclosed by *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 196. In accordance with the ruling in the *Phelps Dodge* case, the Board has exercised its discretion on this question (R. 606–607, 613).

In their answer to the Board's petition for enforcement, respondents assert (R. 686) that the Board is guilty of "nonfeasance and neglect of duty," and that

the order is void, because the Board failed to introduce evidence and make findings on the question of whether any of the employees made "any reasonable effort to obtain other employment." While it is true that the Board should order deductions from back pay on account of "clearly unjustifiable refusal to take desirable new employment", the matter of showing a basis for such deductions is an affirmative defense which must be put in issue by respondents and is in no sense a part of the Board's case. *Phelps Dodge* case, *supra,* 313 U. S. at 199–200. Respondents do not contend that they were at any point precluded from "going to proof on this issue" (*id.,* at 200). No such issue was raised affirmatively by respondents either in their pleadings, at the hearing, in their exceptions to the Trial Examiner's intermediate report which recommended reinstatement with back pay, or in their briefs in support of said exceptions. Although the *Phelps Dodge* decision was rendered approximately 6 months before that in the instant case, respondents at no time contended before the Board that any employee had wilfully incurred losses which should be deducted. Not having objected on this ground when the matter was before the Board, respondents are now barred by Section 10 (e) of the Act from raising the point. *N. L. R. B.* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 341; *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 662 (C. C. A. 9); *N. L. R. B.* v. *Grower-Shipper Vegetable Ass'n,* 122 F. (2d) 368, 378 (C. C. A. 9); *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F. (2d) 780, 790 (C. C. A. 9), cert. den. 312 U. S. 678; *N. L. R. B.* v. *Baldwin Locomotive Works,* 128 F. (2d) 39, 50 (C. C. A. 3); cf.

Corning Glass Works v. *N. L. R. B.,* 118 F. (2d) 625, 629–630 (C. C. A. 2).

There is no merit to respondents' further contention (R. 684–685, 689–691) that the Board has been guilty of laches because of the time involved in deciding this case and in instituting enforcement proceedings. Aside from the fact that a defense of laches is not available in a proceeding brought by an agency of the Federal Government,[22] "the statute contains no time-limit mandate to the National Labor Relations Board for the rendering of its decisions." *Triplex Screw Co.* v. *N. L. R. B.,* 117 F. (2d) 858, 862 (C. C. A. 6); *N. L. R. B.* v. *Wilson Line,* 122 F. (2d) 809, 815 (C. C. A. 3). Furthermore, respondents need not have waited until the Board asked for an enforcement order, [*Wilson case, supra; N. L. R. B.* v. *Aluminum Products Co.,* 120 F. (2d) 567, 573 (C. C. A. 7); *N. L. R. B.* v. *Isthmian Steamship Co.,* 126 F. (2d) 598, 601 (C. C. A. 2)]; they had a right to petition this Court for a review of that order had they desired to do so. Section 10 (f) of the Act.

At any event, any delay on the Board's part was not capricious, and the Board is not guilty of "nonfeasance and neglect of duty," as respondents contend. The fourth amended charge, which is the basis for the complaint herein, was filed on May 4, 1939 (R. 500; 11); 2 days later the Board issued its amended complaint, and the hearing before the Trial Examiner was there-

[22] *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123; *Board of County Commissioners of the County of Jackson, Kansas* v. *United States,* 308 U. S. 343; *N. L. R. B.* v. *Nebel Knitting Co.,* 103 F. (2d) 594 (C. C. A. 4).

after held from May 18 to June 16, 1939 (R. 500, 503). The record covered more than 2,900 typewritten pages, as well as many exhibits (R. 693–3341). After the Trial Examiner had filed his Intermediate Report, respondents sought and secured extensions of time within which to file exceptions and briefs. Considering the same factors of crowded dockets [23] and inadequate personnel which are present in courts of record, it cannot be said that there was "unnecessary delay on the part of the Board." *N. L. R. B.* v. *National Casket Company,* 107 F. (2d) 992, 995 (C. C. A. 2); *N. L. R. B.* v. *Grower-Shipper Vegetable Ass'n,* 122 F. (2d) 368, 379 (C. C. A. 9); *Wilson* and *Isthmian* cases *supra.* On this record there can be no equity in imposing the burden of delay upon the persons whom respondents discriminatorily deprived of their jobs; respondents have no just cause for complaint on this score. *N. L. R. B.* v. *Electric Vacuum Co.,* 315 U. S. 685, 697–698; *Phelps Dodge Corp.* v. *N. L. R. B.,* 113 F. (2d) 202, 206, aff'd on this point 313 U. S. 177; *Grower-Shipper Vegetable* case, *supra; N. L. R. B.* v. *Wilson Line,* 122 F. (2d) 809, 815–816 (C. C. A. 3); *N. L. R. B.* v. *Superior Tanning Company,* 117 F. (2d) 881, 892 (C. C. A. 7).

[23] On July 1, 1939, 4,113 cases were before the Board in various stages, and 6,177 cases were received by the Board between July 1, 1939, and June 30, 1940, making a total of 10,290 cases on the Board's docket during its fiscal year from July 1, 1939, to June 30, 1940. (Fifth Annual Report of the National Labor Relations Board, G. P. O., p. 20). During its fiscal year ending June 30, 1941, the Board received an additional 9,151 cases; and during the balance of that calendar year up to the date of issuance of the Board's decision and order in the instant case, the Board received more than 1,700 new cases. (Sixth Annual Report of the National Labor Relations Board, G. P. O., p. 21).

CONCLUSION

It is respectfully submitted that the Act is applicable to respondents, that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue affirming and enforcing said order.

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APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 et seq.) are as follows:

Sec. 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a

labor dispute burdening or obstructing commerce or the free flow of commerce.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

Sec. 10 (e) * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

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